

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Chillicothe and Ashville, Ohio)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 99-322
RM-9762

To Assistant Chief, Audio Division

**REPLY TO COMMENTS IN RESPONSE TO REQUEST FOR SUPPLEMENTAL
INFORMATION**

Clear Channel Broadcasting Licenses, Inc., a subsidiary of Clear Channel Communications, Inc. (together, "Clear Channel") and the licensee of WFCB(FM), Chillicothe, Ohio, by its attorneys, hereby submits its reply to the "Comments in Response to 'Request for Supplemental Information'" (the "Comments"), filed on July 17, 2003 in the above-captioned proceeding by Franklin Communications, Inc., North American Broadcasting Co., and WLCT Radio Incorporated (collectively, the "Joint Petitioners").¹ In this proceeding, the Commission reallocated WFCB to Ashville, Ohio, as that community's first local service, finding that it would result in a preferential arrangement of allotments under the FM allotment priorities.² The Joint Petitioners' Comments were filed in response to the Commission's June 2, 2003 Request for Supplemental Information, which sought a showing from Clear Channel that Ashville is

¹ Clear Channel hereby requests leave to submit this Reply to the extent that it is necessary for it to do so. In their Comments, the Joint Petitioners introduce compliance with the Commission's local radio ownership rule as a basis for reversing the Commission's allotment decision. Clear Channel has not had an opportunity to respond to this argument. Moreover, as discussed herein, the Joint Petitioners offer a faulty and insufficient factual showing pursuant to *Tuck*. Accordingly, the public interest in the development of a full and complete factual record in this proceeding supports the Commission's acceptance of this Reply.

² *Chillicothe and Ashville, Ohio*, 17 FCC Rcd 20418 (M. Bureau 2002)

independent of Columbus, Ohio under the factors outlined in *Faye and Richard Tuck*³ Clear Channel submitted such a showing in a July 17, 2003 Response to Request for Supplemental Information (the “Response”)

In their Comments, the Joint Petitioners advance two arguments: first, that the reallocation of Channel 227B from Chillicothe to Ashville is prohibited by the recently adopted local radio ownership rule,⁴ and second, that under *Tuck* Ashville is not independent of the Columbus, Ohio Urbanized Area. Neither argument is persuasive⁵

The new local radio ownership rule, which is not even effective yet, presents no bar to the Ashville allotment. The Commission has consistently addressed multiple ownership compliance issues raised in an allotment proceeding in the context of the implementing application, not at the allotment stage.⁶ At the allotment stage, the Commission determines whether the proposed change in community of license will result in a preferential arrangement of allotments using its FM allotment priorities, not whether a particular entity is qualified to hold the station license if the requested change is granted.⁷ Nothing in the *Ownership R&O* indicates

³ *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988)

⁴ See *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, FCC 03-127, MB Docket No. 02-377, released July 2, 2003 (“*Ownership R&O*”)

⁵ In a rather lengthy section that provides an exhaustive account of past Commission rules and regulations concerning a radio station’s obligation to serve its local community, the Joint Petitioners also contend that the local radio ownership rule spelled out in the *Ownership R&O* has rendered the *Tuck* analysis obsolete. However, the *Ownership R&O* contains nothing purporting to overrule the Commission’s historical allotment policies, and the Joint Petitioners’ attempt to revolutionize Commission policy is woefully out of place in the post-grant phase of a single allotment case.

⁶ See *Detroit Lakes and Barnesville, Minnesota, and Enderlin, North Dakota*, 17 FCC Rcd 25055, 25059-60 (2002) (“*Detroit Lakes*”) (“In order to achieve an efficient and orderly transaction of both the rulemaking process and the subsequent application process, any issue with respect to compliance with Section 73.3555 of the Rules will be considered in connection with the application to implement this reallocation”), *Letter from Peter H. Doyle, Acting Chief, Audio Services Division, to Paul A. Cicelski, Esq. et al.*, File No. BAPH-20001101ABD (May 24, 2001).

⁷ See *Modification of FM and Television Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

that the Commission intends to depart from this practice, nor should it. Moreover, unless it provides the staff with specific instructions to the contrary, the Commission does not apply new rules or policies retroactively to allotment proceedings in which an action has been taken.⁸ This policy recognizes the fact that the Commission permits parties to rely on allotment actions once they have become effective.⁹ Here, it is undeniable that the Ashville allotment has become effective, and nothing in the *Ownership R&O* directs the staff to apply the new local radio ownership rule retroactively

The Joint Petitioners' *Tuck* argument also fails to provide any basis for reconsideration of the Ashville allotment. Clear Channel's Response clearly showed that Ashville is a separate and distinct community, independent from the Columbus Urbanized Area under the *Tuck* factors

Under the *Tuck* analysis, the FCC considers "the extent [to which] the station will provide service to the entire Urbanized Area, the relative populations and proximity of the suburban and central city, and most importantly, the independence of the suburban community."¹⁰ The Joint Petitioners overemphasize the importance of the first two elements of the *Tuck* analysis and present precious little to rebut Clear Channel's showing. With respect to

⁸ See *Barnwell, South Carolina, and Pembroke, Douglas, Willacooche, Statesboro, Pulaski, East Dublin, Swainsboro and Twin City, Georgia*, MM Docket No. 00-18 (released July 25, 2003) (noting that, in adopting a new policy not to grant a rulemaking petition that requires a vacant allotment "backfill" to preserve local service, the Commission "did not instruct the staff to set aside prior actions" and that such a "going-forward approach best accommodates the needs of the listeners and the need of licensees for an orderly administrative process.")

⁹ See *Auburn, Northport, Tuscaloosa, Camp Hill, Gardendale, Homewood, Birmingham, Dadeville, Orrville, Goodwater, Pine Level, Jemison and Thomaston, Alabama*, DA 03-1124, MM Docket No. 01-104 (released May 20, 2003) (stating that it is Commission policy to accept rulemaking proposals that rely on actions taken in earlier rulemaking proceedings once they become effective, because such a policy "benefit[s] the public"), *Winslow, Camp Verde, Mayer and Sun City West, Arizona*, 17 FCC Red 14688 (2002) (granting an Application for Review and allotting a station to Sun City West, Arizona, because, subsequent to the Report & Order in the proceeding, the Commission had granted an application to downgrade a station in Yuma, Arizona, and amended the FM Table of Allotments accordingly, eliminating a conflict with the Sun City West allotment)

¹⁰ See *Old Fort, Fletcher, and Asheville, North Carolina, Suigovinsville, Tennessee, and Augusta, Georgia*, DA 03-2035, MM Docket No. 01-175 (2003)

signal coverage, WFCB serves only 2.7% of the Columbus Urbanized area from its existing site (the site proposed in its implementing Form 301 application). It is well settled that a *Tuck* analysis is not required at all for cases in which less than 50% of the urbanized area will be covered.¹¹ More fundamentally, however, the *Tuck* analysis in this particular case was triggered by a request from the FCC based on a *speculative possibility* of a *future move* of WFCB to serve more of the Columbus market. The “service to the entire Urbanized Area” prong of analysis, therefore, is by definition unquantifiable in this case and cannot have any weight. In any case, the Commission has approved reallocation proposals in which 67% and even 90% of the urbanized area is served.¹²

With respect to the size and proximity of Ashville as compared to Columbus, Ashville, with 3,174 residents according to the 2000 U S Census, has substantial population. Despite the Joint Petitioners’ attempted sleight-of-hand in claiming that “[t]he city limits of Columbus are within 10 miles of Ashville,” Ashville is 19 miles from the center of Columbus, as shown by the Joint Petitioners’ own evidence.¹³ The FCC has approved reallocations involving comparable distances.¹⁴ The area between Columbus and Ashville is at stretches entirely undeveloped, spotted along the way with distinct small villages. Tellingly, the Joint Petitioners themselves note the “rural nature” of Ashville.¹⁵

¹¹ See *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995).

¹² See *Mullins and Branchiffe Acres, South Carolina*, 14 FCC Rcd 10516 (1999) (67% of urbanized area covered by reallocated facility), *Orabi and Leupp, Arizona*, 14 FCC Rcd 13547 (1999) (90% of urbanized area covered).

¹³ See Comments at Exhibit C (copy of MapQuest printout showing a distance of 19.1 miles and driving time of 32 minutes from Ashville to the center of Columbus).

¹⁴ See *Moberly, Malta Bend, Chillicothe, Lee’s Summit, La Monte, Warsaw, Nevada, Maryville & Madison, Missouri & Topeka, Junction City, Humboldt, Marysville & Burlington, Kansas & Auburn, Nebraska*, 16 FCC Rcd 21182, 21183 n.5 (2001) (approving reallocation of a station to Lee’s Summit which lies 27 kilometers or just under 17 miles from “Kansas City’s center city coordinates”).

¹⁵ Comments at 7.

In any case, the Commission has held that the final *Tuck* factor, interdependence of the community and urbanized area, is “the most important factor considered.”¹⁶ The FCC considers a community independent when a majority of the eight sub-factors demonstrate that the community is distinct from the urbanized area.¹⁷ As noted below, the record set forth by Clear Channel in its Response overwhelmingly establishes that a majority of the *Tuck* sub-factors are satisfied in favor of finding Ashville’s independence from Columbus

- *Independent Local Government and Elected Officials* – The Joint Petitioners do not even attempt to contest the fact that Ashville has its own elected local government comprising “its own mayor, city council and other various elected village officials.”¹⁸
- *Independent Municipal Services Such As Police, Fire Protection, Schools and Libraries* – The Joint Petitioners similarly concede that Ashville has its own fire department and police force, as well as a school system entirely independent of the Columbus school system.¹⁹ Ashville also has its own water and sewer facilities and ambulance service
- *Community Leaders and Residents Perceive the Community as Separate* – Clear Channel submitted with its original *Tuck* showing a letter from Ashville’s Village Administrator, Frank Christman, in which he states that Ashville is a separate and distinct village. The various Ashville community organizations listed in Clear Channel’s Response offer further evidence of Ashville’s actual and perceived independence.²⁰ The Joint Petitioners offer only a comment in a speech of Ashville’s mayor concerning the “creep” of Columbus southward towards Ashville,²¹ which comes nowhere close to undermining Clear Channel’s showing on this sub-factor

¹⁶ *See* *Seven, Rincon, and Statesboro, Georgia, Palatka and Middleburg, Florida*, 17 FCC Rcd 20485, 20486-87 (2002)

¹⁷ *See* *Detroit Lakes*, 17 FCC Rcd 25055, 25057 n 10 (2002)

¹⁸ Comments at 7

¹⁹ *See id.* at 9

²⁰ *See* Response at Exhibit 6 (listing Ashville civic organizations).

²¹ *See* Comments at 7. Indeed, the cited mayor’s speech, the annual State of Ashville address, is further evidence of Ashville’s independence and drive to maintain self-determination. The Mayor notes in closing that “the village is in sound financial condition with a great school system and great community resources, and I will diligently work for our vision. Remembering our rural heritage, the village of Ashville will be a strong and friendly community offering an enhanced quality of life achieved through progress and teamwork. It will be a place people will want to live and businesses will want to locate.” *The State of Ashville Address*, Mayor Chuck Wise (2003) (<http://www.ashvilleohio.net/stateofashville2003.htm>, last visited August 8, 2003)

- *Independent Commercial Establishments, Health Facilities, and Transportation* – As evidenced in Clear Channel’s Response, Ashville is a village with a multitude of thriving commercial establishments. The Joint Petitioners manage only to nitpick that Ashville has no health care facilities, but even this feeble rebuttal fails to identify the several doctors, optometrists, and dentists who practice in the town. In addition, the Berger Home Health facility, a nursing service that provides medical assistance to home bound patients, is located in Ashville and is associated with Berger Hospital of Circleville.
- *Independent Telephone Book and Zip Code* – Included in Clear Channel’s Response is a photograph from Ashville’s website of the Ashville Post Office, listing Ashville’s zip code. While the Joint Petitioners complain that Ashville shares its zip code with one other community and its phone book with several nearby communities, it is undisputed that Ashville does not share its zip code or yellow pages with Columbus.

Thus, despite the best efforts of the Joint Petitioners, a majority of the *Tuck* sub-factors are virtually uncontested and indicate conclusively Ashville’s independence. Of the remaining *Tuck* sub-factors, moreover, the Joint Petitioners’ arguments against Ashville’s independence are unconvincing.

- *The Extent to Which Residents Work Elsewhere* – The Joint Petitioners irrelevantly cite recent residential development in Ashville and claim that it is a “bedroom community” of Columbus. Yet the Joint Petitioners concede that according to the 2000 U.S. Census, 39% of Ashville residents work in Pickaway County, where Ashville is located.²² This is a much higher percentage of residents working in the community than approved in other allotment cases.²³
- With respect to the relevant advertising market, in the letter submitted with Clear Channel’s original *Tuck* showing, the village administrator states that Ashville businesses are more likely to advertise in the Circleville Herald as opposed to the Columbus newspaper.²⁴ In terms of other media, the village administrator’s comment regarding advertising naturally leads to the conclusion that Ashville residents rely on the Circleville Herald as opposed to the Columbus newspaper. As the village administrator’s letter notes, moreover, Ashville’s media includes a village website (<http://www.ashvilleohio.net>)

²² See Comments at 6

²³ See, e.g., *Huntsville, La Porte, Nacogdoches and Willis, Texas, and Lake Charles, Louisiana*, 16 FCC Rcd 19597 (2001) (approving reallocation with 27% of the work force remaining in the smaller community for work)

²⁴ See Response at Exhibit 3

Ultimately, the Joint Petitioners are unable to raise any serious doubt regarding Ashville's independence from Columbus. On this record, at least a majority – and more probably all eight – of the *Tuck* factors weigh in favor of a finding that Ashville is an independent community entitled to a first local service.

CONCLUSION

Nothing in the Joint Petitioners' comments warrants undoing the Commission's reallocation of Channel 227B to Ashville. The petition for reconsideration of that action should be denied.

Respectfully submitted,

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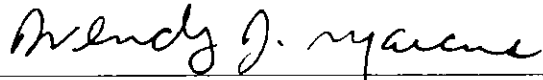
Certificate of Service

I, Wendy J. Marcus, hereby certify that on August 13, 2003, I caused a copy of the foregoing Reply to Comments in Response to Request for Supplemental Information to be mailed via first-class postage prepaid mail to the following:

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A handwritten signature in black ink, reading "Wendy J. Marcus", is written over a horizontal line.

Wendy J. Marcus